



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 4, 2004

Ms. Patricia J. Acosta
Assistant District Attorney
Thirty-Fourth Judicial District
500 East San Antonio Street, 2nd Floor
El Paso, Texas 79901-2420

OR2004-0862

Dear Ms. Acosta:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 194848.

The Office of the District Attorney for the 34th Judicial District (the "district attorney") received four requests. For the first two of the requests, the requestor asks the following question: "Can you please verify if you still have Victor Belton's shoes?" For the third and fourth requests, the requestor says, we would like "to verify if the police have [sic] custody of Mr. Victor Belton's shoes." You object to responding to these requests on several grounds. First, you argue that the Public Information Act ("Act") does not require a governmental body to answer questions. Second, you argue that the Act does not require a governmental body to obtain information not in its possession in response to a records request. Finally, you argue that the information requested is excepted from disclosure under section 5552.103 of the Government Code. We have considered your claims.

Generally, the Act requires governmental bodies to provide access to or copies of requested public information and records. *See* Gov't Code §§ 552.001, .002, .221. This office has determined that the Act does not require a governmental body to prepare answers to questions. *See* Open Records Decision No. 555 at 1-2 (1990). Therefore, we agree that the Act does not require the district attorney to answer the first two questions in this case.

However, while the Act does not require a governmental body to answer questions, a governmental body must make a good faith effort to relate a request to information that it holds. *See* Open Records Decision No. 561 at 9 (1980). You have submitted to this office information that relates to the request; such information is subject to required public disclosure unless an exception applies.

You raise section 552.103 of the Government Code; however, you did not comply with the procedural deadline of section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. See Gov't Code § 552.301(e). You received the first request for information on October 23, 2003, and the second request on October 27, 2003. Yet, you did not submit to this office the information that relates to these requests until January 23, 2004.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. See *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). You have submitted to this office arguments regarding your section 552.103 claim from Mr. Tommy L. Skaggs, Assistant Attorney General in the Postconviction Litigation Division of the Office of the Attorney General ("OAG"). Mr. Skaggs informs this OAG division that the requested information relates to the investigation and subsequent capital murder trial of Tony Egbuna Ford in Cause No. 69441-346 of the 346th District Court of El Paso County, Texas. Mr. Skaggs states that

the Postconviction Litigation Division is presently litigating matters relating to Mr. Ford's capital murder conviction in a postconviction federal writ of habeas corpus proceeding that was filed by Mr. Ford, wherein Mr. Ford is seeking, among other things, to be discharged from State custody and to have his conviction and death sentence vacated. The referenced litigation is styled *Ford v. Dretke*, Civil Action No. EP-01-CA-386, and is pending before the United States District Court for the Western District of Texas, El Paso Division. The OAG is representing the Respondent, Doug Dretke, in that litigation by virtue of Dretke's capacity as the Director of the Texas Department of Criminal Justice, Correctional Institutions Division.

The need of a governmental body, other than the body that has failed to timely comply with the Act's procedures, may, in appropriate circumstances, be a compelling reason for non-disclosure. See Open Records Decision No. 586 (1991). In this instance, we find that the OAG Postconviction Litigation Division's assertion of its interest in having the requested

information withheld constitutes a compelling demonstration, sufficient to overcome the heightened presumption of openness, that the information that relates to the first and second requests may be withheld under section 552.103 of the Act. *See id.*, *see also* Open Records Decision Nos. 469 (1987) (university may withhold information under section 552.103 predecessor to protect district attorney's interest in anticipated criminal litigation); 121 (1976) (same).

As for the third and fourth requests, the Act does not require the district attorney to inquire of the police department if it has custody of the shoes. The Act generally applies to information already in existence and in the governmental body's possession. *See* Gov't Code § 552.002 (unless governmental body owns or has right of access to information held by another entity for governmental body, Act only applies to information governmental body collects, maintains, or assembles under a law or ordinance or in connection with transaction of official business). Thus, the Act does not require a governmental body to obtain information that is not in its possession. *See* Open Records Decision No. 518 at 2 (1989). Therefore, the Act does not require the district attorney to respond to the requests for verification of the police department's custody of the shoes.

In summary, the Act does not require the district attorney to answer questions or to respond to requests for verification of the police department's custody of the shoes. Based on section 552.103, the district attorney may withhold from required public disclosure information that relates to the requests.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records

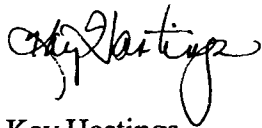
will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kay Hastings
Assistant Attorney General
Open Records Division

KH/seg

Ref: ID# 194848

Enc: Submitted documents

c: Texas Innocence Network
100 Law Center
Houston, Texas 77204
(w/o enclosures)